SUPREME COURT

FILED

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In The

Supreme Court of the United States

October Term, 1974

No. 74-1432

HARRY ERNEST RUBENS and JEANNE RUBENS,

Petitioners,

vs.

NEW YORK STOCK EXCHANGE, INC.; KIDDER PEABODY & CO., INC.; MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on the 13th day of February, 1975.

OPINIONS BELOW

The final judgment of the Circuit Court of Appeals dated February 13th, 1975, is reported at 510 F.2d 968 (Appendix A (1a)); the final judgment of the District Court dated July 10, 1974 (Appendix B (3a)); the interim judgment of the District Court dated March 18, 1974 (Appendix C (6a)); the order of the District Court dated October 9th, 1973 (Appendix D (14a)). The District Court judgments and opinions have not been reported.

JURISDICTION

Jurisdiction is conferred upon this Court to review the judgment of the Court of Appeals by writ of certiorari by United States Code, Title 28, §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Can fraudulent conduct of the brokers be justified by the lower Courts' findings that "such conduct is in accordance with normal practice in the stock brokerage industry, and is sanctioned by custom and usage of long standing"?

2. Whether the present continued use of a customer's agreement on an unsuspecting public, containing a compulsory waiver of the customer's right to sue in a court of law for violation of the Securities Act, should be enjoined?

3. Whether the deceptive use in the State Court of a customer's agreement containing the compulsory waiver of the customer's right to sue, is not sufficient misrepresentation to the

State Court of the customer's rights, to warrant rejection of the brokers' renewed effort to obtain a stay in the District Court?

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, as amended in Article V, provides:

> "no person shall . . . be deprived of . . . property, without due process of law. . . ."

STATUTES INVOLVED

The Federal Securities Statutes involved are:

Sections 78j-(b) of the United States Code [15 U.S.C. §78j-(b)] June 6, 1934, Ch. 404, 48 Stat. 891 reading:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Sections 78o(c)(1) of the United States Code [15 U.S.C. §78o(c)(1)] June 6, 1934, Ch. 404, 48 Stat. 895 reading:

> "No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of any manipulative, deceptive, or other fraudulent device or contrivance. The Commission shall, for the purposes of this subsection, by rules and regulations define such devices or contrivances as are manipulative, deceptive, or otherwise fraudulent."

Section 78q(a) of the United States Code[15 U.S.C. §78q(a)] June 6, 1934, Ch. 404, 48 Stat. 897 reading:

> "Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association, and every broker or dealer registered pursuant to section 78o of this title, shall make, keep, and preserve for such periods, such accounts, correspondence, memoranda, papers, books, and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or

> appropriate in the public interest or for the protection of investors. Such accounts, correspondence, memoranda, papers, books, and other records shall be subject at any time or from time to time to such reasonable periodic, special, or other examinations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors."

Section 77n of the United States Code (15 U.S.C. §77n) May 27, 1933, Ch. 38, Title I, §14, 48 Stat. 84, reading:

> "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

STATEMENT OF THE CASE

Petitioners sought to protect their investment in securities, having a value of about $341,000, by selling them in the open market. The respondent brokers, Kidder, Peabody & Co., Inc. (Kidder) and Merrill, Lynch, Pierce, Fenner & Smith, Inc., (Merrill Lynch), advised a "box" sale in which the shares instead of being directly transferred to the purchaser, are acquired by the brokers who reregister them in the brokers' name, and deposit them in their cashier's box.

From the cashier's box, the shares are randomly selected and sold for the customer's account.

The "box" sale advised by the brokers gives the petitioner the option of repurchasing the identical securities, a useful feature should the market increase substantially after the sale, or decline moderately. By exercising the option, petitioners are required to pay a federal tax at twice the normal rate.

The brokers, after selling petitioners' securities, stated that the shares sold from the "box" are no longer the petitioners' shares, that they are "borrowed" by the broker on behalf of petitioners, for which service the broker is entitled to retain the $341,000 realized from the sold shares, and use it for the private profit of the brokers. The respondents designate the sale as a "short" in which the customer sells securities he does not possess. In addition, the brokers require the customer to advance additional sums to the broker, should the shares rise in price thereafter, despite the obvious liquidation of the petitioners' interest in the shares.

Thus, petitioners were required to advance $6,000 to the broker Merrill Lynch, when interest charges on the price differential rose to in excess of $400 per month, despite the obvious sale of petitioners' securities. A total of $639.92 was taken from petitioners' account with Kidder, and $1,321.87 was taken by Merrill Lynch, despite the Merrill Lynch use of petitioners' $6,000.

When petitioners complained about the practice, the broker Merrill Lynch made partial restitution of the interest. The broker Kidder refused.

Petitioners then sued Kidder in the New York State Court, but the attorneys for Kidder moved for a stay, alleging a compulsory arbitration clause in the customer's agreement. The State Court agreed, and when petitioners refused arbitration, dismissed the action. Meanwhile, the respondent broker required the arbitration to be held before the New York Stock Exchange, Inc. (NYSE), a defendant herein.

After an abortive attempt to arbitrate, involving the NYSE refusal to disqualify two panel members who were also members of the Exchange, the petitioners withdrew from the hearing on the arbitration, and brought suit in the District Court to recover damages for violations of the Federal Security Acts by the respondent brokers Kidder and Merrill Lynch and to enjoin future violations of the Acts by the brokers and the NYSE, acting in concert, for selling petitioners' registered shares and retaining the selling price, using the proceeds of the sale for making loans to other customers of the respondent brokers, at large interest rates, which interest was kept by the brokers.

The defendant Kidder, without answering, again moved for a stay in the District Court under the United States Arbitration Act, which the District Court granted (Appendix D (14a)).

During the stay, the NYSE brought in an award in favor of the broker Kidder and upon Kidder's motion, the District Court dismissed the complaint against them (Appendix C (6a)).

The second broker, Merrill Lynch, then brought a motion to dismiss which the District Court granted (Appendix B (3a)).

The District Court, in the same opinion, dismissed the action against the New York Stock Exchange without motion by the Exchange, granting judgment to all defendants.

Plaintiff thereupon appealed to the Circuit Court of Appeals which affirmed without opinion (Appendix A (1a)).

REASONS FOR GRANTING THE WRIT

I.

The lower Courts have improperly accepted false affidavits of the brokers, in the face of undisputed evidence that the shares sold could not have been "borrowed" since they contained petitioners' registered shares.

The brokers have sworn by affidavits that the shares sold were "borrowed." The actual fact is that registered shares of petitioners, reregistered in the broker's name were actually sold.

Thus, shares N6477-79, admittedly sold by Kidder, were actually registered shares, delivered to Kidder by petitioner. They could not have been "borrowed" and the Kidder affidavit is obviously false.

The brokers allege that they are entitled to withhold from petitioners, the proceeds of the sale. These are turned over to the party loaning the shares, which here amounts to $341,000.

The District Court found (Appendix C (8a)):

> "As the proceeds of sale remained with Kidder, plaintiff also lost the use of their money for a period, and Kidder used the funds in its business, including the making of interest-bearing loans to other customers."

Thus, petitioners and the public are deprived of their property to the private gain of the brokers.

Neither the Circuit Court of Appeals nor the District Court attempted to reconcile the sworn affidavit supplied by Kidder with the indisputable evidence that petitioners' shares were actually sold, and were not borrowed.

Such direct sale contradicts the theory that the shares sold were borrowed and that the monies received from the sale were turned over to the owner of the "borrowed" shares, as security for the loan of the shares.

It is apparent that the broker merely deposited petitioners' shares in its cashier's box, and randomly selected the shares sold which included petitioners' shares. Such shares were not "borrowed."

The Courts below have approved the broker's use of the wholly owned customer's securities in these words:

> "Such conduct is in accordance with normal practice in the stock brokerage industry and is sanctioned by custom and usage of long standing" (Appendix B (4a)).

In addition to the fraudulent practice of "borrowing" shares for the sale which entitles the broker to retain the proceeds and use them for their private gain, both brokers charged the petitioners interest amounting to $1,971.79, after the sale of petitioners' shares, because the market price of the shares rose after the sale.

No rational explanation has been advanced for charging the petitioners interest since the brokers possessed all of petitioners' shares, and neither the petitioners nor the brokers were concerned with the price of the shares after the sale.

Yet the brokers assert an unlimited liability against petitioners for market conditions, totally contrary to petitioners' purpose in selling their shares.

The brokers allege a tax advantage to the public by a "box" sale. In fact, when petitioners repurchased the securities, they paid double the rate otherwise required.

When petitioners complained about the procedure, a partial restitution of the interest charge was made, which can only be taken as an admission of its bogus nature.

The primary purpose of the litigation is to enjoin further bookkeeping practices which show a fictitious borrowing, allowing brokers to retain the proceeds and to charge interest for the fictitious borrowing to the detriment of the public.

II.

A. The open and continued use by the brokers of a compulsory arbitration clause in a customer's agreement constitutes a violation of 15 U.S.C.§77n, and nullifies the relevant Supreme Court decision.

A secondary point for review is the continued fraudulent use of a compulsory arbitration agreement covering future disputes, despite the prohibition of *Wilko v. Swan,* 346 U.S. 427, decided by this Court in 1953, supporting 15 U.S.C. §77n.

Such an agreement covering future disputes is used by all brokers.

The continued use of such an agreement constitutes a fraud upon an unknowing public, unaware that such agreements are void.

Further use should be enjoined.

B. Kidder and its attorneys deliberately employed the compulsory arbitration agreement to deceive the State Court where petitioners originally sought relief.

Petitioners originally sought relief, *pro se,* from the respondent broker Kidder in the New York State Court. There, the compulsory arbitration agreement was deliberately used by knowing counsel for Kidder who moved in the State Court to stay petitioners' effort to obtain a judicial review, and later to dismiss petitioners' complaint for failure to arbitrate, pursuant to the agreement.

Such motion constituted a fraud upon the Court and upon petitioners. When petitioners subsequently found that the respondent brokers had a right to conduct such arbitration by using two fellow brokers on a board of arbitration before the NYSE itself, petitioners sought relief in the District Court before the arbitration proceedings were consummated.

Despite the clear prohibition of *Wilko v. Swan*, the District Court stayed the federal proceeding to allow a panel of arbitration containing the two fellow brokers to proceed and to bring in an *ex post facto* award to Kidder.

The broker Kidder now seeks to benefit from the deceit practiced upon the State Court and upon petitioners.

III.

The New York Stock Exchange, having formulated the rules which permit its members to carry out fraudulent transactions for bilking the public, is a necessary party.

The members of the NYSE defend their corrupt practice by swearing that they are merely following the Rules of the Exchange. Thus, to prevent such devious transactions involving the sale of a customer's securities, it is clear that the New York Stock Exchange has to assume the primary responsibility. This is what the petitioners have sought to achieve.

SUMMARY

Petitioners believe that the function of the broker members of the New York Stock Exchange is to buy and sell securities and to accept a proper commission for such services.

The brokers, however, seek to justify extra costs to the public consumer of such services, by alleging fictitious practices, such as "borrowing" shares when actual shares are delivered for the sale, thus giving them the right to use the proceeds of the sale for the private gain of the broker, and to charge interest for the sale of wholly owned shares.

The Security Exchange Act of 1934, and the Securities Act of 1933 were enacted to protect the public against the manipulations and contrivances of the broker engaged in overreaching practices to the financial injury of the public. The lower Courts have decided the issue on custom and usage of long standing.

CONCLUSION

For the foregoing reasons, the public interest requires, it is respectfully submitted, that the petition for writ of certiorari should be granted.

Respectfully submitted,

s/ Peter L. Berger
Attorney for Petitioners

APPENDIX A

JUDGMENT OF UNITED STATES COURT OF APPEALS DATED FEBRUARY 13, 1975

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of February one thousand nine hundred and seventy-five

Present:

HONORABLE PAUL R. HAYS,

HONORABLE WILFRED FEINBERG,

Circuit Judges,

HONORABLE JAMES S. HOLDEN,

District Judge.

HARRY ERNEST RUBENS and JEANNE RUBENS,

Plaintiff-Appellants,

Appendix A

-against-

NEW YORK STOCK EXCHANGE, INC., KIDDER PEABODY & CO., INC., MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Defendants-Appellees.

No. 74-2147

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed upon the opinions of Judge Brieant, dated March 18, 1974 and July 16, 1974.

s/ Paul R. Hays

s/ Wilfred Feinberg
U.S.C.JJ.

s/ James S. Holden
U.S.D.J.

APPENDIX B

JUDGMENT OF UNITED STATES DISTRICT COURT DATED JULY 16, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HARRY ERNEST RUBENS and JEANNE RUBENS,

Plaintiffs,

-against-

NEW YORK STOCK EXCHANGE, INC.; KIDDER, PEABODY & CO., INC.; MEMBERS, MERRILL LYNCH PIERCE FENNER & SMITH, INC.,

Defendants.

73 Civ. 3557-CLB

Brieant, J.

In this action by customers against a stock broker ("Merrill Lynch"), the broker, by notice of motion dated May 7, 1974 seeks summary judgment in its favor. By notice of motion dated May 23, 1974, plaintiffs seek the same relief.

By a memorandum decision dated March 18, 1974, this Court granted summary judgment in favor of co-defendant

Kidder, Peabody & Co. No final judgment was directed at that time.

Stripped of the pejorative description set forth in the affidavit of plaintiff Harry Ernest Rubens, sworn to May 23, 1974, it appears that plaintiffs on July 3, 1969 owned 3,000 shares of Great Western Financial Corp. ("the shares"), which they delivered on that date into their margin account with their stockbroker, Merrill Lynch, etc. On the same date they sold 3,000 shares thereof "short against the box" for $69,000.00. This was not a "pure gambling transaction" as plaintiff's affidavit characterizes a routine short sale where there are no shares in the box to begin with, and seller's liability is unlimited. Rather, it was a lawful and permissible way to reconstitute an ordinary sale into a short sale, so as to vary sellers' income tax consequences. The short sale was covered on about January 21, 1970.

While the short sale remained open and until it was covered on or about January 21, 1970, defendant Merrill Lynch debited plaintiffs' account for interest, in the net amount of $1,254.33. At the same time, Merrill Lynch held the same amount of shares belonging to plaintiffs, in its cashier's cage in street name. As to all such shares of customers held in margin accounts, Merrill Lynch could, and doubtless did, hypothecate them with banks, lend them to other customers, or otherwise deal with the shares to its own advantage. Such conduct is in accordance with normal practice in the stock brokerage industry and is sanctioned by custom and usage of long standing. See our Memorandum of March 18, 1974 filed in this action.

Appendix B

For reasons which are not clear, the interest charges were returned to plaintiffs on August 27, 1970.

Even in the absence of the return of the money, no claim is stated, on these undisputed facts, where a usual and normal sale "short against the box" was carried out in a proper manner, and, incidental thereto the stockbroker enjoyed, arguably, the use of the shares while the sale remained open.

The liability asserted against the defendant New York Stock Exchange is based on the same facts, and is vicarious. Thus, the complaint should be dismissed also as to it.

Based upon the foregoing, and our Memorandum decision dated March 18, 1974, summary judgment is granted to defendant, Merrill Lynch, etc., and the complaint is dismissed as to all parties. The Clerk of the Court shall enter final judgment that all relief shall be denied, pursuant to Rule 58(1), F.R.Civ.P.

So Ordered.

Dated: New York; New York
July 16, 1974

CHARLES L. BRIEANT, JR.
CHARLES L. BRIEANT, JR.
U. S. D. J.

APPENDIX C

INTERIM JUDGMENT OF THE UNITED STATES DISTRICT COURT DATED MARCH 18, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HARRY ERNEST RUBENS and JEANNE RUBENS,

Plaintiffs,

-against-

NEW YORK STOCK EXCHANGE, INC.; KIDDER, PEABODY & CO., INC.; MEMBERS, MERRILL LYNCH PIERCE FENNER & SMITH, INC.,

Defendants.

73 Civ. 3557-CLB

Brieant, J.

Defendant Kidder, Peabody & Co., Incorporated ("Kidder") moves alternatively for summary judgment pursuant to Rule 56(b), F.R.Civ.P., or to dismiss pursuant to Rule 12(b)(6) for failure to state a claim.

By their complaint, filed August 15, 1973, plaintiffs pleaded a total of four separate causes of action. The first cause is

alleged against Kidder only. The second is pleaded against Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill Lynch"), and the last two are alleged against the New York Stock Exchange, Inc., and both of its said member firms.

Subject matter jurisdiction was asserted based on Sections 10(b) and 15(c)(1) of the Securities Exchange Act of 1934, and 17(a) of the Securities Act of 1933. There is no diversity jurisdiction.

Movant relies on undisputed facts. Kidder is a stockbroker. Plaintiffs were its customers. They had each executed identical printed form customer agreements requiring them to arbitrate certain controversies therein described which might arise *in futuro.*

The agreement to arbitrate possible future, inchoate controversies [contrasted with an agreement to arbitrate an existing dispute] was voidable under *Wilko v. Swan,* 346 U.S. 427 (1953) and its progeny, if the controversy arose under federal securities laws. The *Wilko* doctrine, however, does not bar submission of an existing controversy to arbitrators. *Pearlstein v. Scudder & German,* 429 F.2d 1136, 1143 (2d Cir. 1970), *cert. denied* 401 U.S. 1013 (1971); *Moran v. Paine, Webber, Jackson & Curtis,* 389 F.2d 242 (3rd Cir. 1968).

After executing the printed form of customer agreement, plaintiffs delivered to Kidder stock certificates for 2,900 shares of Detroit Steel Corporation and 3,000 shares of Eastern Gas & Fuel Associates, then having a total market value of about

$241,900.00. Plaintiffs instructed Kidder to sell the same number of shares "short against the box." Kidder did so, and acting under claim of right, withheld the proceeds, and charged its customers' account about $600.00 interest on marks to the market until such time as the short sale would be closed out. As the proceeds of sale remained with Kidder, plaintiffs also lost the use of their money for a period, and Kidder used the funds in its business, including the making of interest bearing loans to other customers.

There was no clandestine aspect to Kidder's conduct; the withholding of the sales proceeds was known to plaintiffs and the interest charges were debited openly on their monthly statements of account following the making of the short sale.

Subsequently, plaintiffs demanded return of the interest debited against their margin account, and when this was refused, sued Kidder in the Civil Court of the City of New York for $600.00.

There, they stated a colorable state claim for money had and received, of which that Court had subject matter jurisdiction without regard to the federal securities laws, and with respect to which the customers agreement to arbitrate future controversies was, under state law, valid and enforceable.

On October 30, 1970, Kidder moved timely, for an order of the Civil Court staying the proceedings and directing arbitration. That Court did so, and later dismissed the action, while granting a subpoena for the arbitration proceeding.

Appendix C

It would seem clear that plaintiffs could have dropped their efforts to obtain redress on their state claim, and begun an action in this Court alleging a claim, arising out of the same operative facts, based on the federal securities laws. Had they then done so, we would have considered those state proceedings no bar, [*Vernitron Corp. v. Benjamin,* 440 F.2d 105 (2d Cir.), *cert. denied,* 402 U.S. 987 (1971); *cf. Pearlstein v. Scudder & German, supra*] and further, that plaintiffs could, under *Wilko,* litigate their federal claim in this Court, without the necessity of arbitrating.

But plaintiffs, persons of apparent means and reasonable intelligence, did not do this. Instead, shortly prior to November, 1972, plaintiffs acted pursuant to the arbitration agreement. Exercising a choice available thereunder, between arbitration under the rules of the American Arbitration Association, and arbitration pursuant to the rules of the New York Stock Exchange, they selected the latter method. The served and filed a clearly stated and articulate formal request, addressed to the Arbitration Director of the Exchange, setting forth in more than adequate detail, facts constituting the basis of their claim against Kidder. Therein, they made a number of specific requests as to how the arbitration should be conducted, and "appear[ed] . . . in person" [see par. 9 of the request for arbitration, attached as Exhibit C to the Notice of Motion.].

Thereafter, on November 3, 1972, plaintiffs executed a formal submission, on printed NYSE forms, and thereafter proceeded to arbitrate. While the arbitration was pending, and in recess on consent until an agreed date, October 17, 1973, plaintiffs on August 15, 1973 instituted this action.

Appendix C

The action was stayed pending resolution of the arbitration. See our memorandum and order dated October 9, 1973 and filed herein.

Following the award of arbitrators, plaintiffs failed to move for an order modifying or vacating the award within 20 days as required by New York C.P.L.R. §7509 (McKinney 1963).

The claim being arbitrated was, colorably, a state law claim. Plaintiffs in the first instance so regarded it, and that view is not unreasonable. Documents before the Court on this motion, and undisputed facts compel the inference that plaintiffs elected to arbitrate. If the conclusion of the Civil Court of the City of New York was wrong, as now contended, plaintiffs should have appealed, or alternatively brought action in this Court at that time on their federal claim. [*Cf. Pearlstein, supra.*]

Instead, they filed a request for arbitration [Exhibit C] containing at the same time a purported disclaimer which reads:

> "3. The request for arbitration has been imposed upon claimants by the broker, based upon a printed form agreement which the broker compelled the claimants to sign, but which was never signed by the broker in the presence of the claimants, nor was an executed copy of the same concurrently given claimants."

Later, in their formal submission [Exhibit B] they wrote:

Appendix C

"Signed at New York, N.Y. on Nov. 3, 1972, under the circumstances contained in paragraph No. 3 of the statement of claim, by . . ." [Signatures omitted]

We view this disclaimer as being of no effect under the circumstances. Plaintiffs acted affirmatively to initiate the arbitration, and to elect between two optional methods of procedure available under their customer agreements. The inference is unavoidable that if the arbitration had resulted in a large recovery against Kidder, plaintiffs would have found no infirmity therein. Clearly, plaintiffs by their affirmative actions, as well as by their failure to sue before the arbitrators convened, waived all rights to object to arbitrability.

Now, disappointed with the outcome of the arbitration, they seek to "Blow hot and cold", something which is not to be permitted. See Beck, Walter, "Estoppel Against Inconsistent Positions in Judicial Proceedings, 9 *Bklyn Law Review* 245."

Accordingly, I conclude that the motion for summary judgment should be granted.

Alternatively, plaintiffs' allegations of fraud appear insufficient to support a Rule 10b-5 action. See *Republic Technology Fund, Inc. v. The Lionel Corp.*, 483 F.2d 540 (2d Cir.), *cert. denied*, ___U.S. ___(1973); *Chris-Craft Indus., Inc. v. Bangor Punta Corp.*, 480 F.2d 341 (2d Cir. 1973); *Shemtob v. Shearson, Hammill & Co.*, 448 F.2d 442 (2d Cir. 1971). If our decision rested on this ground alone, the Court would permit

plaintiffs to replead and comply with Rule 9(b), F.R.Civ.P. In view of the arbitration award, this would be pointless.

There remains the question whether we may make the express determination that there is no just reason for delay, and should direct a final judgment as to movant, only, in accordance with Rule 54(b), F.R.Civ.P.

The piecemeal disposition of litigation, followed by piecemeal appellate review, is not favored. On February 7, 1974 this Court approved a stipulation which provided, with respect to the co-defendants, that

> "the time for these defendants to answer or move with respect to the complaint herein be and hereby is extended to twenty (20) days after the determination of plaintiffs' pending motion for summary judgment against defendant Kidder, Peabody & Co., Inc., or such other date as Court may hereafter establish."

Tested by hindsight, that stipulation now appears to have been approved improvidently, since there is now no basis before the Court to permit us to evaluate whether or not final judgment should be entered solely as to Kidder. As to this issue, decision is reserved to await the coming in of a responsive motion or pleading from these other defendants.

The complaint is dismissed as to defendant Kidder, Peabody & Co., Inc. only.

Appendix C

So Ordered.

Dated: New York, New York
March 18, 1974

s/ Charles L. Brieant, Jr.
CHARLES L. BRIEANT, JR.
U. S. D. J.

APPENDIX D

ORDER OF THE UNITED STATES DISTRICT COURT DATED OCTOBER 9, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HARRY ERNEST RUBENS, et ano.,

Plaintiffs,

-against-

NEW YORK STOCK EXCHANGE, INC., et al.,

Defendants.

73 Civ. 3557

Brieant, J.

A substantial portion, or perhaps all of the matter in controversy between the parties to this action has been submitted to arbitration pursuant to the rules of the New York Stock Exchange. Arbitration is now proceeding and hearings are expected to resume before the panel of arbitrators on October 17, 1973, which is an agreed date, selected by a consensus of the arbitrators and the parties.

Appendix D

This action commenced August 15, 1973, while the arbitration was in recess on consent. A stay of all proceedings is appropriate. 9 U.S.C. §3.

Whether the arbitration, or the judgment of a court which will presumably be entered thereon disposes of the entire controversy is a matter which should be reserved for decision after the arbitration proceeding is complete.

The submission to arbitration of an existing controversy [factually distinguishable from an agreement to submit future controversies to arbitration] does not violate any provision of the securities laws. *Pearlstein v. Scudder & German*, 429 F.2d 1136, 1143 (2d Cir. 1970), *cert. denied* 401 U.S. 1013 (1971).

All proceedings in this action [including, but not limited to, all discovery, plaintiffs' motion for summary judgment and the motion of defendant Kidder, Peabody & Co. to dismiss the complaint] are hereby stayed pending the further order of the Court.

Arbitration should not be permitted to proceed at the snail's pace often attributed to litigation. Under the circumstances, the parties, and, we hope, the arbitrators, will act with diligence in order to resolve the controversy.

The Court will conduct a conference of all counsel appearing in the action on January 11, 1974 in Room 2704 at 2:00 P.M., to obtain a status report concerning the action, and to consider whether the stay of proceedings should be continued.

In the event that the arbitrators render a decision prior to such date, movant shall file a true copy in Chambers, and furnish all counsel with a copy of his letter transmitting same.

So Ordered.

Dated: New York, New York
October 9, 1973

CHARLES L. BRIEANT, JR.
CHARLES L. BRIEANT, JR.
U. S. D. J.

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SUPREME COURT, U. S.

FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1432

HARRY ERNEST RUBENS and JEANNE RUBENS,
Petitioners,

vs.

NEW YORK STOCK EXCHANGE, INC.; KIDDER, PEABODY & CO. INCORPORATED; MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Respondents.

WAIVER OF RIGHT TO FILE WRITTEN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

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In view of the fact that this case clearly does not warrant review by the Supreme Court of the United States, as shown in the July 16, 1974 and March 18, 1974 opinions of Charles L. Brieant, U.S.D.J., reprinted at pages 3a-13a of the Appendix to the Petition and affirmed without opinion by the United States Court of Appeals for the Second Circuit on February 13, 1975 (App., p. 1a-2a), and in order to avoid burdening the Court, respondents hereby waive their right to file briefs in opposition to the Petition for a Writ of Certiorari.

Respectfully submitted,

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May 23, 1975